

DOCKET FILE COPY ORIGINAL

RECEIVED

FEB 28 1997

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Closed Captioning and Video Description)	MM Docket No. 95-176
of Video Programming)	
)	
Implementation of Section 305 of the)	
Telecommunications Act of 1996)	
)	
Video Programming Accessibility)	

COMMENTS OF CBS INC.

Howard F. Jaeckel
Nicholas E. Poser

51 West 52nd Street
New York, New York 10019

February 28, 1997

Its Attorneys

No. of Copies rec'd
List ABCDE

029

TABLE OF CONTENTS

I.	Introduction and Summary.....	1
II.	Rules of General Applicability.....	5
A.	The Commission's Proposed Rules Generally Represent An Effective And Reasonable Means Of Carrying Out The Mandates Of Section 713.....	5
B.	There Are Several Categories Of Programming For Which General Exemptions Should Be Created.....	12
1.	Interstitials and Promotions.....	12
2.	Commercial and Political Advertisements.....	13
3.	Foreign Language Programming.....	14
III.	Exemptions For Sports Programming And For Library Materials Should Be Created For Program Providers Who Do Not Have National Audience Reach.....	16
A.	Regional And Local Providers Of Sports Programming Should Be Exempt From Any Captioning Requirement.....	18
B.	All Providers Other Than National Broadcast Networks Should Be Exempted From Any Requirement To Caption Library Programming.....	22
IV.	The Commission Should Rely On Existing Complaint Processes to Enforce Captioning Requirements.....	25
	Conclusion.....	26

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Closed Captioning and Video Description)	MM Docket No. 95-176
of Video Programming)	
)	
Implementation of Section 305 of the)	
Telecommunications Act of 1996)	
)	
Video Programming Accessibility)	

COMMENTS OF CBS INC.

CBS Inc. ("CBS") hereby respectfully submits its comments in response to the Commission's Notice of Proposed Rule Making ("Notice") in the above docket, in which the Commission seeks comment on proposed rules and implementation schedules to fulfill the statutory mandate of the Telecommunications Act of 1996 with respect to closed captioning.¹

I. Introduction and Summary

In Section 713 of the Telecommunications Act, Congress presented the Commission with the task of ensuring that future video programming be made "fully accessible" to deaf and hearing-impaired viewers through the provision of closed captions, to the extent that requiring captions will not be "economically burdensome to the provider or owner of such programming." The Commission similarly was charged with ensuring that programming

¹ Section 305 of the Telecommunications Act of 1996 ("Act"), Pub. L. 104-104, 100 Stat. 56. Section 713 to the Communications Act, (codified at 47 U.S.C. §613) ("Section 713").

providers and owners “maximize the accessibility” of programming first exhibited prior to the effective date of the forthcoming regulations, subject to the same exception for captioning that would be economically burdensome.

To a significant degree, CBS believes that the proposed rules and timetables set forth by the Commission in its Notice represent an effective and reasonable means of carrying out the mandates of Section 713. As we stated in our comments in response to the Commission’s 1995 Notice of Inquiry in this docket² and as the Commission acknowledged in its Report to Congress issued last summer,³ there are significant obstacles to making video programming fully accessible, including both the high cost and the lack of availability of captioning services. The timetable for compliance proposed by the Commission, requiring full accessibility of new programming only after eight years, provides the flexibility needed by program providers to overcome these obstacles. The Commission’s decisions not to impose non-technical standards and not to require that particular captioning methods be used are also critical to providers’ ability to meet the challenges of cost and scarcity of services.

CBS can also understand the Commission's view that program providers are in the best position to ensure that the programming they distribute is captioned, even though, as the Commission acknowledges, it is most efficient to caption programming at the production stage. Therefore, we do not now oppose the proposal to place on providers the ultimate responsibility for captioning. However, we urge the Commission to make clear that it stands ready to exercise

² See generally Comments of CBS Inc. (March 15, 1996) (“CBS Comments”).

³ Implementation of Section 305 of the Telecommunications Act of 1996 - Video Accessibility, Report, MM Docket No. 95-176, FCC 96-318 (released July 29, 1996) at ¶¶ 46-78 (“Report”).

the jurisdiction Congress gave it over other parties, such as program producers or syndicators, should evidence develop of the widespread refusal of such parties to caption programming -- which would dramatically increase the costs of captioning to the industry as a whole.

If the Commission does place responsibility on the provider, the compliance of multichannel programming distributors with captioning requirements should be measured on a service-by-service basis, not over the system as a whole. The obligation of local broadcasters to multichannel services should not go beyond their own responsibilities under the Commission's captioning regulations. And where a provider is already meeting its captioning obligations under the regulations, it should not be required to caption additional programming if the captions in that programming need reformatting.

As detailed in our earlier comments, it is demonstrable that the national networks can make their programming fully accessible through closed captioning. CBS, for example, captions all of its new network programming, with the sole exception of its overnight news service UP TO THE MINUTE.⁴ CBS also captions all library programming that appears on the network, whether or not it was originally captioned. Thus, despite the significant expense involved -- between four and five million dollars in the case of CBS's network programming -- it is our experience that national broadcast networks are able to handle the burdens imposed by the proposed regulations.

We do believe, however, that general exemptions covering all program providers are appropriate in a small number of circumstances. CBS agrees with the Commission's tentative conclusion that no program providers should be required to caption promotions and

⁴ See CBS Comments at 9.

“interstitials” -- i.e., brief non-commercial messages between programs -- because of the logistical problems which would be entailed in captioning the large number of these items broadcast daily; the short interval between their creation and telecast; the costs involved; the fact that such programming usually contains visual elements making captions unnecessary; and the availability of much of the same information in program guides. We also believe there should be no requirement to caption advertisements, including political advertisements and so-called “infomercials.” The decision of whether to caption such commercial messages should be made by those paying to convey them to the audience -- namely, the advertisers. Foreign language programming should also be exempted from mandatory captioning because of the high costs involved, the relatively small audiences across which the costs of captioning can be spread, and the extreme shortage of foreign language captioning services.

In addition, we believe that those program providers less able to incur the costs of captioning and to secure the necessary services -- local broadcasters, as well as cable and other programming providers who do not distribute their programming to a national audience -- should be granted additional exemptions for specific types of programming. Local and regional providers of sports programming should be granted an exemption for this programming because of the high cost of real time captioning services, the unavailability of these services (particularly in many of the areas in which much local and regional sports programming originates), the limited viewership for such programs, the inability to spread captioning costs over repeat telecasts, and the relative lack of need for captioning of sports events.

Similarly, program providers other than national broadcast networks should not be required to caption library material that is not already captioned. Based on the industry’s entirely voluntary achievements in the captioning field to date, there is every reason to believe

that voluntary efforts will result in the captioning of archival material where it is economically feasible. However, inflexible requirements to caption library programming would unfairly diminish the economic value of such material to copyright owners who could not have anticipated such regulations, and might in some instances result in the unavailability of such programming to the public -- especially in circumstances where the costs of captioning could not be absorbed through wide distribution or repeat airings of the programming.

CBS agrees with the Commission that the issue of enforcement of its new rules is best left to existing types of complaint processes. Responsibility to comply should rest on the program providers, who, if challenged, could submit evidence of their captioning performance to the Commission. There is no reason to impose burdensome reporting requirements in advance of any evidence of noncompliance. We also believe that if it becomes necessary to measure the percentage of a provider's programming that is captioned, the calculation should be based on a time period no shorter than one month.

II. Rules of General Applicability

A. The Commission's Proposed Rules Generally Represent An Effective And Reasonable Means Of Carrying Out The Mandates Of Section 713

For the most part, the general rules proposed by the Commission for implementing the mandates of Section 713 are reasonable because they account for the preeminent facts about closed captioning: (1) it is very expensive to provide and (2) captioning services, particularly for real-time captioning, are scarce, and competition for them will become even stiffer in the future, as program providers that do not now caption their programming begin to do so under government mandates.

CBS has previously described the significant costs involved in providing different types of captioning. The cost of basic off-line captioning⁵ for network programming ranges between \$850 to \$2100 per hour of programming, depending on the type of programming involved.⁶ Encoding of the captions onto the program tape entails an additional expense ranging approximately from \$200 for a half-hour program to \$650 for a two-hour program. Real-time stenocaptioning of network programming costs \$350 to \$900 per hour, while real-time captioning for local programming costs approximately \$175 to \$300 per hour.⁷

At the same time, capacity to provide captions is limited, particularly for real-time captioning. As the Commission recognizes, there are only a small number of real-time captioners nationwide today.⁸ Increasing the numbers of qualified stenocaptioners will take a significant amount of time.⁹ Moreover, demand is likely to increase more rapidly than supply. There are thousands of hours of presently non-captioned programming, originating from local

⁵ In off-line captioning, captions are transcribed for the entire audio track of a program prior to broadcast, synchronized to the program's time code and locked onto the program tape.

⁶ The costs of other types of off-line captioning, are also high. Live encoded captioning, which is created prior to broadcast and transmitted with the program at the time of air, costs approximately \$600 to \$900 per hour of programming. Automatic live-encoded captions -- which are created prior to broadcast, transmitted with the program and encoded onto the program tape after broadcast, so that rebroadcasts will be captioned -- cost approximately \$1200 or more for a half-hour program and \$2200 or more for an hour program. The various types of captions and their uses are more fully described in our earlier comments. See CBS Comments at 10-13.

⁷ See CBS Comments at 18. Among other reasons, network real-time captioning is more expensive than local real-time captioning because of network use of satellite feeds, higher standards for acceptable error rates, and the need for backup capability and refeed capacity.

⁸ Notice at ¶ 24.

⁹ See CBS Comments at 26-27.

broadcasters and from a variety of cable services and other program providers, for which captioning services will be sought because of Section 713.¹⁰ Competition for these services, even if their availability expands significantly over the next few years, will undoubtedly be great, and demand is likely to keep prices high.

The Commission's core proposed rules are generally well conceived because they give program providers the flexibility needed to cope with these realities. The eight year transition period for achieving full accessibility for new programming will allow program providers some time to find affordable sources of captioning services, and to develop sponsorships or other means of defraying the significant costs of captioning. The transition period will also provide critical time for the development of additional captioning services to absorb the vastly increased demand that Section 713 will create.

The Commission's expressed view that there should be a transition period for implementation of mandates to caption library programming¹¹ also reflects an understanding of the burdens that captioning such material would impose on video library owners. However, CBS does not believe that these burdens are adequately addressed by the Commission's proposal that 75% of library programming be captioned. We submit that the operation of the marketplace is likely to result in the captioning of library programming where it is economically viable to do so, but that mandates to caption this programming will only result in its being left on the shelf in

¹⁰ As the Commission has noted, there are over 100 national cable programming networks, most of which operate 24 hours a day, seven days a week and more than 40 regional and local cable networks which "represent thousands of hours of television programming daily." Report at ¶ 73. In addition, there are thousands of hours of programming broadcast daily by local television stations.

¹¹ Notice at ¶ 58.

those instances where captioning would be economically burdensome. Consequently, we suggest that rather than impose a percentage mandate, the Commission should limit any requirement to caption library programming to the national broadcast networks.¹²

Equally important is the Commission's tentative decision not to impose non-technical standards of quality or accuracy, and not to mandate the use of any particular methods of captioning. As the Commission rightly notes, high quality real-time captioning is expensive, in short supply and requires different and more advanced skills than do other types of captioning.¹³ Imposing accuracy or other quality standards would make captioning "economically burdensome" because it would essentially require all programming providers to compete for the services of the relatively few highest cost, highest quality captioning services. There necessarily will be losers in this competition, whose use of the lower quality services might place them in violation of accuracy standards they could not afford to meet. Similarly, any requirement to use real-time captioning instead of electronic newsroom (ENR) captioning would set off a competition for real-time services, and result in some providers -- i.e., those who fail to secure the services of scarce stenocaptioning services -- being unable to meet their regulatory obligations.

CBS does not now take issue with the Commission's decision to place responsibility for captioning on video programming providers. We understand the Commission's view that the program provider, because of its direct link to its audience, is in the best position to ensure its programming is captioned. Moreover, measuring the percentage of a

¹² CBS already captions all library programming appearing on its network, and intends to continue to do so in the future.

¹³ See Notice at ¶¶ 112-13.

provider's programming that is captioned appears the most feasible method of ascertaining compliance with the proposed regulations.

Nevertheless, as the Congress stated¹⁴ and as the Commission has acknowledged, "captioning at the production stage is often the most efficient manner to include closed captions with video programming."¹⁵ It would, for example, be unreasonably inefficient to require each local station to caption nationally-syndicated programming when the program producer or syndicator could provide a captioned version of the program to all stations licensing it. Although it may be expected that marketplace negotiations will result in the captioning of nationally syndicated programming by the program producer or syndicator, there can presently be no assurance of this result in all cases.

For this reason, CBS urges the Commission to make clear that, if evidence develops that inefficiencies are being created by producers' refusal to caption programming, it will in the future consider regulations obligating them to bear this responsibility. We believe it is clear that Congress intended to provide the Commission with jurisdiction over parties such as program producers, owners and distributors, as well as over program providers under Section 713. As the Commission notes,¹⁶ the statute makes numerous references to "program providers and owners." (Emphasis added). We do not believe the statute would provide, as it does, that "a provider of video programming or program owner may petition the Commission for an

¹⁴ See H.R. Rep. No. 204, 104th Cong., 1st Sess. 114 (1995) ("House Report") ("It is clearly more efficient and economical to caption programming at the time of production and to distribute it with captions than to have each delivery system or local broadcaster caption the program.")

¹⁵ Notice at ¶ 30.

¹⁶ Notice at ¶ 29.

exemption”¹⁷ unless the statute contemplated that the Commission could impose captioning responsibility on that owner.¹⁸

Assuming captioning is the responsibility of the program provider, the Notice seeks comment on several issues bearing on the provider’s obligations. First, where the provider is a multichannel video programming distributor (“MVPD”), the Commission tentatively suggests that compliance with the percentage requirements should be measured on a system-wide basis.¹⁹ We believe that Commission’s alternative proposal to measure compliance on a service-by-service or channel-by-channel basis²⁰ is fairer, and will result in a more even and broadbased expansion of captioning services. There is no reason to create a situation in which an MVPD might pressure one service to caption more of its programming because other services are failing to caption any of their programming. No service that is making a good faith effort to expand its captioning should be placed in a position where it is effectively subsidizing other services that resist captioning.

The Commission also asks whether, if a broadcast station is retransmitted by an MVPD, compliance should be the responsibility of the MVPD offering the service directly to the

¹⁷ Section 713(d)(3).

¹⁸ Similarly, Congress provided that, in determining whether to create general exemptions under Section 713(d)(1), the Commission should consider, *inter alia*, “(2) the impact on the operations of the program provider, distributor, or owner; [and] (3) the financial resources of the program provider, distributor or owner....” House Report at 115. This is another indication of Congressional intent to confer on the Commission jurisdiction over parties other than program providers.

¹⁹ Notice at ¶ 43.

²⁰ *Id.* at ¶ 44.

subscriber or the broadcast station.²¹ In these circumstances, the station's obligation to the MVPD should not go beyond its own responsibilities under the Commission's captioning regulations. The station will have to meet its captioning obligations for its own signal, and therefore presumably will be providing sufficient captioning for the MVPD to fulfill its obligation with respect to that particular broadcast channel.

Finally, we agree that providers who receive programming with captions should generally be obligated to retransmit the captions, regardless of whether they are otherwise meeting their obligations under the Commission's regulation. However, this should not be the case if the captions need to be reformatted. As the Commission notes, captions often must be reformatted when programming is retransmitted because the programming must be edited to fit a different time period and different commercial loads.²² As the Commission recognizes, the costs of reformatting, while usually not as high as captioning itself, are substantial.²³ These costs should not be imposed on a provider that is already meeting its obligations under the Commission's rules.

²¹ Id. at ¶ 44.

²² Id. at ¶ 22.

²³ Id. at ¶ 22 ("Estimates of reformatting costs generally range between \$350 and \$450 per hour, depending on the amount of editing, although it is reported that the cost of reformatting can be as high as \$750") (footnotes omitted). There are circumstances in which reformatting a program will involve as much cost as the original captioning. For example, where a program must be time compressed for its repeat airing and the provider has only a tape of the program (even with the captions encoded on it), but does not have access to the separate disc and/or master tape from which the captions were originally time-encoded, captions may have to be done entirely recreated.

B. There Are Several Categories Of Programming For Which General Exemptions Should Be Created

Under Section 713(d)(1), “the Commission may exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming.” CBS believes there are several categories of programming for which general exemptions, covering all programming providers, should be created. Those categories are (1) “interstitials” and promotions; (2) all advertisements (including “infomercials” and political advertisements); and (3) foreign language programming.

1. Interstitials and Promotions

CBS agrees with the Commission’s tentative conclusion that interstitial and promotional announcements should be exempted from captioning requirements.²⁴ Many program providers run hundreds of promotions every week, many of which are created only shortly before their telecast. Because they are specific to a particular showing of a specific program, they are not reusable at a later date.

Requiring the captioning of such promotions would be very expensive, logistically difficult, and would not achieve any significant public benefit. Program producers would have to incur substantial costs to develop in-house capacity to create captions for promotions, and either encode them or otherwise ensure that they were transmitted at the numerous, irregular times that the promotions run. The benefits to the hearing-impaired audience resulting from these expensive efforts would be minimal. The information regarding

²⁴ Notice at ¶ 79.

the date and time of the program is often given graphically, and nothing more is conveyed than what is listed in program guides contained in local newspapers and other publications.

2. Commercial and Political Advertisements

The Commission should not impose any obligation to caption advertisements -- particularly not on program providers -- but rather should leave it to advertisers to decide whether they wish to caption their advertising. Advertisers now caption a substantial number of the commercials broadcast on network television. We believe the Commission is correct in assuming that, as additional programming is captioned, advertisers are likely to see the benefits of captioning their advertisements as a means of reaching a sizeable additional audience.

But ultimately the decision of whether or not to caption a commercial should rest with the party having the economic interest in selling the advertised product. The Commission should allow the advertiser to determine whether the ability to reach additional consumers through captioning is worth the extra cost of producing the captions. What the Commission clearly should not do is impose on program providers an obligation to caption commercial messages. This would likely force providers to raise the price of advertising time and could drive some potential advertisers out of the television market. Alternatively, the providers would have to absorb the cost of captioning, in effect subsidizing advertisers' efforts to reach potential new customers.²⁵

²⁵ The rule we propose here should also be applied to paid programming. As with other advertising, the decision whether to caption so-called infomercials should rest with the party paying for the programming to appear. The Commission should not obligate the provider to subsidize the advertisers' message by forcing the provider to caption infomercials.

Any requirement to caption political advertising would be even more misdirected. Political candidates should be free to decide whether they want to caption their political messages in order to reach hearing-impaired voters. As the Commission recognizes, “[r]equiring parties to close caption political advertising ... could impose an economic burden and, thus, might prevent some of this type of advertising, especially political advertising for local elections.”²⁶ And it would be most inappropriate to place on program providers the burden of captioning paid political messages. As in the case of commercial advertising, imposing the obligation to caption political messages on program providers would in effect force those providers to subsidize that advertising.²⁷ In the political context, the inherent unfairness of such forced subsidization would be magnified by broadcasters’ lack of discretion to refuse political advertising from federal candidates,²⁸ and by the First Amendment implications of requiring broadcasters to underwrite production costs of partisan messages. In addition, there would be severe logistical problems in requiring broadcasters to caption political advertisements, which are often submitted or altered at the last minute in response to late-breaking developments.

3. Foreign Language Programming

Captioning of foreign language programming is now in its earliest phases of development, and the twin obstacles of cost and scarcity are even more pronounced in this area

²⁶ Notice at ¶ 80.

²⁷ It is not clear whether a broadcaster could pass along to candidates the additional cost of captioning a political advertisement without violating its obligation to sell time to candidates at its lowest unit charge. See 47 U.S.C. §315(b).

²⁸ See 47 U.S.C. § 312(a)(7).

than they are generally. There is very little captioning of Spanish programming, the foreign language programming most likely to be captioned. The Telemundo cable network is now real-time captioning one hour daily (two half-hours) of national news. We are aware of only one local broadcaster that is providing real-time captioning of Spanish language programming. That station, KMEX, Los Angeles, captions one hour daily of news programming. It also appears that there is currently only one Spanish language program being captioned off-line.²⁹

In addition, the cost of real-time captioning in Spanish is higher than for English real-time captioning. Our understanding is that the hourly rate is approximately \$350, well above the \$175 to \$300 per hour range that local broadcasters pay for English language services.

Foreign language programming services have relatively small audiences over which to spread the cost of captioning. Even the largest Spanish language cable services reach only a fraction of the audiences reached by comparable English language cable networks.

Given the higher costs of, and the severe lack of services for, foreign language captioning -- and the proportionately greater burden of providing such captioning due to the smaller audiences for this programming -- a mandatory requirement in this area would clearly cause general economic hardship. At least for the foreseeable future, voluntary efforts, such as Telemundo's captioning of an hour of national news, should be relied on gradually to expand the availability of captioned foreign language programming.

²⁹ That program is the "Just Yabba Dabba Do It" series of cartoons airing on The Cartoon Networks.

III. Exemptions For Sports Programming And For Library Materials Should Be Created For Program Providers Who Do Not Have National Audience Reach

As indicated above, CBS believes it is reasonable to require national broadcast networks, which reach virtually 100 percent of the national audience, to caption their programming, including sports programming and library material that they choose to broadcast. Despite the substantial cost, the captioning of nationally televised sports events is not an undue economic burden because of the significant budgets involved, the networks' ability to obtain and afford real-time captioning services, and the networks' ability to induce sponsors to contribute to the expense of captioning high visibility sports events. Similarly, the burden on national broadcast networks to caption library programming is not an undue burden. The fixed costs of captioning such programming can be absorbed in the networks' national revenue base. In addition, library programming simply does not represent a significant percentage of the national networks' programming.

But with respect to captioning both sports and library programming, the economic realities are radically different for all program providers that lack the comprehensive distribution of national broadcast networks. CBS submits that for these providers exemptions for sports and library programming are appropriate under the standards set forth in Section 713.

In its discussion of the appropriate standards for exempting "classes of programmers and providers from our rules where the requirement to provide closed captioning would prove to be economically burdensome for the entire class,"³⁰ the Commission seeks comment on whether a definition of economic burden should be based on factors such as relative market size, degree of distribution, audience ratings or share, relative programming budgets or

³⁰ Notice at ¶ 70.

revenue base, lack of repeat value, or a combination of factors."³¹ We believe that with the possible exception of market size³² all of these factors may be relevant to the analysis. Most relevant, however, are the factors identified in the House and Conference Reports as those to be considered in determining whether exemptions should be created under Section 713(d)(1).³³ Under a fair assessment of these factors, we believe that local and regional providers of sports programming should be exempted from any captioning requirement and all providers other than the national broadcast networks should be likewise exempted for library programming.

Significantly, Congress has directed that, in considering whether economic burden warrants the creation of categories of exemptions, "the Commission should focus on the individual outlet and not the financial conditions of that outlet's corporate parent, nor on the resources of other business units within the parent's corporate structure."³⁴ Thus, the fact that the owner of a national broadcast network also owns local stations, or regional cable networks that provide sports programming or library programming, should have no bearing on whether the latter outlets should be granted exemptions for these categories of programming.

³¹ Id. at ¶ 71.

³² As discussed below, market size is a far less accurate measure of how well the costs of captioning can be absorbed than, for example, the size of the audience for the programming, or the level of subscription to the cable service providing the programming.

³³ Those factors are: "(1) the nature and cost of providing closed captions; (2) the impact on the operations of the program provider, distributor, or owner; (3) the financial resources of the program provider, distributor, or owner and the financial impact of the program; (4) the cost of the captioning, considering the relative size of the market served or the audience share; (5) the cost of the captioning, considering whether the program is locally or regionally produced and distributed; (6) the non-profit status of the provider; and (7) the existence of alternative means of providing access to the hearing-impaired, such as signing." House Report at 115; H.R. Conf. Rep. No. 458, 104th cong., 2d Sess. 183 (1996) ("Conference Report").

³⁴ House Report at 114-15; Conference Report at 183.

A. Regional And Local Providers Of Sports Programming Should Be Exempt From Any Captioning Requirement

For both local broadcasters and regional cable sports networks, any requirement to closed caption sports programming would economically burdensome. To begin with, the captioning cost would be very high for any entity that provides a significant amount of sports programming. For example, Midwest Sports Channel, a regional cable sports network owned by CBS Inc. and based in Minneapolis, Minnesota, provided to its audience nearly 2000 hours of live programming in 1995. Assuming a conservative rate of \$200 per hour for real time captioning,³⁵ the cost of captioning 2000 hours of programming would be \$400,000.

The high costs of captioning are to a large extent fixed. Because of the relatively limited sizes of their audiences and subscriber bases, local broadcasters and regional sports networks cannot create the efficiencies that national networks can to absorb these fixed costs. Midwest Sports Channel, for example, has only about 1.1 million subscribers. Home Team Sports, a regional sports cable network owned in part by CBS's parent, Westinghouse Electric Corporation, has only 3.6 million subscribers. Subscriberships of these sizes cannot provide a sufficient base to absorb the costs of closed captioning hundreds and hundreds of hours of programming each year.³⁶

³⁵ As stated above, real time captioning costs for local programming have been estimated at between \$175 and \$300 per hour. See p. 6, supra.

³⁶ As noted by the National Cable Television Association in its earlier comments in this proceeding, "Nielsen measurements -- the critical means by which advertising is sold -- are not even taken of cable networks that fail to achieve viewership in 5 million homes." Comments of The National Cable Television Association, Inc. at 13 (March 15, 1996) ("NTCA Comments").

Viewed as a percentage of the budget for individual types of sports programming, the costs of captioning for local broadcasters and regional sports networks are prohibitively high. For example, Home Team Sports provides the public with nearly 20 Atlantic Coast Conference women's college basketball games per year. Assuming captioning costs conservatively at \$200 per hour, a captioning requirement would increase the budget for these games by 4.5 percent. Of course, as a percentage of net income from these games, captioning costs would be much higher, and might eliminate any profit derived from them, or, in some cases, create or increase net losses.³⁷ The fact that Home Team Sports operates in the populous mid-Atlantic region of the country in no way changes the economics of captioning women's basketball.

These facts demonstrate that market size is far less relevant to the analysis of economic burden than is audience size. The size of the audience for collegiate women's soccer,³⁸ for example, will provide a much better indication of whether the costs of captioning the programming can be reasonably absorbed than will the fact that the programming is being offered to subscribers in a region that includes relatively large markets.

Another factor making captioning of local and regional sports programming economically burdensome is that the cost of captioning sports programming generally cannot be recouped through multiple showings of the event. As the Commission itself has noted, "[u]nlike feature films which have continuous audience appeal, sports events have substantial

³⁷ Regional sport networks carry as a service to their viewers a significant number of events for which the cost of production is greater than the advertising revenues. This is the case for many collegiate sports as well as for other sports programming.

³⁸ Home Team Sports currently carries this sport as well.

entertainment value only at the time of their occurrence."³⁹ While a sports event may be repeated within a short time of its occurrence, its value diminishes very rapidly and, in many cases, no advertising revenue can be derived from any repeat airing.

Not only are the costs of captioning relatively more burdensome for local broadcasters and regional sports networks than for national networks, but also the scarcity of captioning services is more severe for them. National broadcast networks can cope with the scarcity of services because of their ability, at least on an occasional basis, to absorb the cost of delivering programming to a distant captioning agency by means of satellite transmission⁴⁰ when a broadcast originates from a location where captioning services are not available.⁴¹ This is simply not economically feasible, particularly on a regular basis, for most local broadcasters or regional networks, which operate in the many areas across the country where captioning services

³⁹ Regulations Pertaining to the Showing of Sports Events on Over-the-Air Subscription Television or by Cablecasting, 52 F.C.C. 2d 1, 57 (1974), on recon., 54 F.C.C. 2d 797 (1975), set aside on other grounds sub nom. Home Box Office, Inc. v. FCC, 567 F. 2d 9 D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

⁴⁰ In our earlier comments, we reported that the cost of delivering programming to a captioning agency by means of satellite transmission was then approximately \$700 per hour. See CBS Comments at 19 n. 25. Since that time, rates have increased, due in part to the scarcity of available satellite time.

⁴¹ The Commission appears to suggest that, because the CBS Television Network has succeeded in captioning regional coverage of the national NCAA Men's Basketball tournament, a requirement to caption regional and local sports is feasible and not economically burdensome. See Notice at ¶¶ 66, 84. Nothing could be further from the truth. CBS -- utilizing the state of the art technical capabilities of a national broadcast network, and with significant assistance from private and governmental sponsors and captioning agency partners -- has accomplished a feat no network has previously achieved, the captioning of all regional coverage of a complex two-week national tournament. This unique achievement lends no support to the notion that it would not be economically burdensome to caption the programming of regional sports providers, who lack the technical and financial resources of a national network. Indeed, even for national broadcast networks, the financial burden of captioning their regionalized sports coverage on a regular basis would be very substantial.

do not exist.⁴² For these programmers, complying with mandatory captioning requirements would be, at a minimum, a severe hardship. Nor is their ability to comply likely to improve in the foreseeable future, when they will be competing with the myriad of other programming providers who will be entering the market for captioning services.

Finally, an exemption for sports programming is also appropriate because captioning is less critical to making the programming accessible than in the case of virtually any other type of programming. Not only is it possible to follow a sports event without captions, but the graphics now commonly used to present information on the event's progress represent an alternative means of providing access for the hearing-impaired. This is particularly true because the constant use of graphics is now standard in the coverage of many sports events.

In summary, local and regional sports programming providers are surely entitled to an exemption from captioning requirements. Initially, these types of programs are among those for which exemption was expressly contemplated by Congress.⁴³ Further, the fixed cost of providing captioning is high, and, when considered against the small size of the local or regional audience over which the cost may be spread and the lack of repeat value of the programming, those costs are prohibitive. The impact of these costs on the providers' programming budgets -- and on their bottom lines -- would be significant. Adding to the burden is the fact that

⁴² As noted in our earlier comments, some captioning agencies have the capability of installing a video telephone line, so that they can see a program that they are captioning which originates in a remote location. Use of this line adds \$50 or more per hour to the cost of real time captioning. See CBS Comments at 20.

⁴³ In discussing the categories for which class wide exemptions could be appropriate, the House Report stated that, "[f]or example, the Commission may determine that it is economically burdensome to require captioning for certain types of programming, such as locally produced or regionally distributed programs." House Report at 114.

captioning services are scarce in many localities and regions, and the shortages will make compliance with captioning requirements even more logistically difficult, and perhaps impossible. Lastly, through the now-prevalent use of constant graphics, there are reasonable alternatives to captioning sports programming.

B. All Providers Other Than National Broadcast Networks Should Be Exempted From Any Requirement To Caption Library Programming

The Telecommunications Act requires the Commission to adopt regulations to "maximize" the captioning of video programming first exhibited before the effective date of these regulations, except to the extent it would be economically burdensome to provide such captioning.⁴⁴ As previously discussed, CBS captions all library programming that appears on its national television network, whether that programming was originally captioned or not. Because of its comprehensive distribution system, reaching virtually 100 percent of the national audience, and because of the relatively small amount of library programming that appears on the network, CBS is able to absorb the costs of captioning archival material that it chooses to broadcast on the network. The same is not true of programming providers lacking the comprehensive distribution of national broadcast networks.⁴⁵

⁴⁴ Section 713(b)(2).

⁴⁵ The economic burden of captioning on even the largest cable networks is significantly greater than that the burden on national broadcast networks. As the Commission stated last Summer:

"Cable networks also differ significantly from broadcast networks in their audience reach. Unlike the four major broadcast networks which reach nearly 100% of the television households in the U.S., even the most widely available cable network reaches only 65% of the nation's television households that choose
(continued...)"

There are literally thousands of hours of theatrical movies, network re-runs and other previously exhibited programming without captions that local broadcast stations and cable networks provide to the public every year. Under the Commission's proposed rules, it is these providers who would bear the responsibility for ensuring that this programming is captioned. The Commission may be correct in assuming that in some circumstances the program providers may be able to induce the syndicator of the programming to caption it. This would most likely occur where the syndicator is successfully licensing the programming widely across the country, and can spread the costs of captioning across its many agreements with licensees.

CBS submits that in these situations, it is reasonable to believe that the type of voluntary efforts that have already led to the captioning of much new television programming will ultimately result in the captioning of widely disseminated library programming.⁴⁶ With respect to a library program that is syndicated nationally, market forces are likely to induce the syndicator to caption the programming because of the greater accessibility that will result and because the cost of captioning can be recouped without adding significantly to any one licensee's fee. Such voluntary efforts are likely -- and should be given an opportunity -- to work.

But in most other circumstances involving library programming, captioning requirements would be enormously burdensome. Captioning mandates would unfairly reduce

⁴⁵(...continued)
to subscribe to cable..."

Report at ¶ 74. For cable networks that reach fewer subscribers, the economic burden of captioning is even greater.

⁴⁶ In fact, some popular off-network programming is beginning to be captioned. For example, Nickelodeon is providing captions for a number of its off-network programs, including I LOVE LUCY, TAXI and MARY TYLER MOORE.